Office-Supreme Court, U.S.
FILED
JAN 2 1964
JOHN F. DAVIS, CLERK

No. 323

IN THE

Supreme Court of the United States

October Term 1963

SHENANDOAH VALLEY BROADCASTING, INC., *et al.*,
Petitioners,

—against—

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO PETITIONERS' BRIEF OPPOSING RESPONDENT'S PETITION FOR REHEARING

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January 2, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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In its Petition for Rehearing Respondent requested clarification of the last sentence of the Court's memorandum opinion of October 21, 1963, to make clear that the Court of Appeals is free, upon the remand of the cause, to consider Respondent's contention that Petitioners' original appeal to the Court of Appeals was out of time for failure to comply with Rule 73(a), Fed. R. Civ. P. Respondent's Petition expressed concern that, absent such a clarification, this Court's remand of the cause "for consideration on its merits" might give rise to an argument by

Petitioners that this Court had considered and determined the further jurisdictional question adversely to Respondent. The Petitioners' Brief Opposing Respondent's Petition for Rehearing confirms the validity of this concern—Petitioners have argued at length that this Court reached and decided the Rule 73 question *sub silentio*.

Apart from the uncertainty arising from the wording of the remanding sentence of the opinion, nothing would seem clearer than that this Court decided only the Expediting Act issue and left for the Court of Appeals all other questions in the case, including the further jurisdictional question arising under Rule 73. This is the Court's usual practice where it has granted certiorari to consider a question of importance and where its disposition of that issue leaves remaining other questions which have not yet been considered by the courts below. *E.g., Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464, 468; *United States* v. *Ballard*, 322 U.S. 78, 88.

Petitioners contend that this Court "of necessity" * passed on and rejected the Rule 73 contention, citing *Langnes* v. *Green*, 282 U.S. 531 and *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435. Petitioners' reliance upon those cases is entirely unfounded--they involve only the unquestioned *power* of this Court to consider any argument made by a respondent, without cross-petition for certiorari, in support of the judgment below, including contentions not passed on and even contentions rejected by the Court below. See Stern and Gressman, Supreme Court

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* Petitioners' Brief Opposing Respondent's Petition for Rehearing, p. 1.

Practice 264 (1962). Petitioners err in reading these cases as imposing an obligation upon this Court to consider and decide such questions.*

The short answer to Petitioners' contention that this Court has already passed upon the Rule 73 question is the fact that the Court requested Petitioners to file a response to the Petition for Rehearing. Obviously the Court would not have required assistance from Petitioners in determining how to dispose of an issue already decided.

The Court's usual practice—remanding for further proceedings an unresolved issue which has become vital for the first time because of the Court's reversal of the ground for decision below—seems entirely appropriate here. Although the question is of obvious importance to Respondent, Respondent cannot conscientiously urge that there are "special and important reasons" within the meaning of Rule 19 of this Court, why this Court should consider the question now, before it has been decided below. Accordingly, Respondent does not join in Petitioners' alternate suggestion** that this Court should set the Rule 73 question down for argument, because of its own significance or as a vehicle for resolving any supposed conflict between the circuits in other cases involving Rule 73 questions. If, upon remand, the disposition by the Court of

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* Petitioners are equally in error in contending that Respondent's Petition for Rehearing fails to meet the standards of Rule 58(2) of this Court. That Rule relates solely to petitions for rehearing of orders granting or denying writs of certiorari. Respondent, of course, seeks rehearing not of that portion of the Court's order granting certiorari, but of that portion remanding the cause, and hence Rule 58(1) governs.

** Petitioners' Brief Opposing Respondent's Petition for Rehearing, p. 8.

Appeals of the Rule 73 issue leaves an important question or a basis for suggesting a conflict between *that* decision and the decision of any other Court of Appeals, it will then be appropriate for this Court to consider, upon proper petition, whether it desires to examine the issue. Meanwhile, the time of this Court need not be spent on the question, particularly since it is hardly susceptible of summary determination, as appears from the opposing contentions of the parties even as briefly developed in the rehearing papers. For these reasons, this case should follow the customary course of letting issues mature through consideration below.

Respectfully submitted,

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